IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. DOUGLAS EDWARD MACKIE

Appeal from the Criminal Court for Cumberland County
No. 8585A Leon C. Burns, Jr., Judge

No. E2008-00816-CCA-R3-CD - Filed February 18, 2009

A Cumberland County jury convicted the defendant, Douglas Edward Mackie, of theft of property valued at $1,000 or more, *see* T.C.A. §§ 39-14-103, -105(a) (2003), and the trial court imposed a sentence of two years and three months to be served as 120 days' imprisonment followed by probation. The trial court ordered restitution to the victims in the amount of $700 and to the person to whom the defendant sold the stolen property in the amount of $300. The defendant appeals, claiming that the evidence adduced at trial was insufficient to support his conviction. Finding the evidence sufficient, we affirm the defendant's conviction; however, we reverse the award of restitution to a person other than the victim of the charged offense. Accordingly, the judgment is modified to reflect restitution in the amount of $700 to the victim of the charged offense and to delete the payment of restitution to a nonvictim.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed as Modified

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Joe L. Finley, Jr., Cookeville, Tennessee (at trial); and John B. Nisbet, III, Cookeville, Tennessee (on appeal), for the appellant, Douglas Edward Mackie.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William E. Gibson, District Attorney General; and Gary S. McKenzie, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On September 24, 2004, the Cumberland County Sheriff's Department received a call from Mildred McDonald reporting that "she might have a stolen storage shed in her possession." When Deputy Avery Aytes reported to Ms. McDonald's residence, he observed a shed that was "approximately ten by twenty [feet]" with "[a] wood frame, double doors, . . . a window on the side and a window in the back." Ms. McDonald informed Deputy Aytes "that [the defendant] had bought the shed and she had helped him go pick it up."

Deputy Aytes testified that he believed the structure to be the same one he had seen while patrolling Ozone Road during the summer of 2004. At that time, Deputy Aytes saw the storage shed on a lot on Ozone Road, and he recalled that the doors to the shed were "ajar." Because the shed was located on private property, he found the unsecured doors suspicious, and he stopped to investigate. Deputy Aytes testified, "[W]hen we approached the building, opened the door and stepped inside, there were a few articles of clothes left on some hangers and some pictures strewn about the floor were the only things left at that time." He stated that the lot also contained another storage shed and "some old cars." He elaborated, "You c[ould] tell nobody had occupied the lot in a long time."

After recognizing the storage shed in Ms. McDonald's possession as the one that he observed on Ozone Road earlier in the summer, Deputy Aytes drove by the property on the following day and saw that "the building was gone." Later that day, deputies located the defendant at another residence on Ozone Road "a mile or so" from the lot. The defendant told Deputy Aytes "that the shed was already at Ms. McDonald's house. And he had only helped her set it up on blocks."

Deputy Aytes testified that he had previously seen the defendant traveling as a passenger in a "small beige or light brown pickup truck . . . maybe a Nissan" driven by Carol Walker. Deputy Aytes said that at the time of the interview, the defendant's driver's license had been revoked.

Cumberland County Sheriff's Deputy Kevin Davis testified that, sometime in September 2004, he "had received a call that someone thought someone was stealing an outbuilding that was on down [Ozone Road]." As he responded to the call, Deputy Davis saw the defendant driving a "brownish colored camouflage Nissan four-wheel drive" pickup on Ozone Road. The truck pulled a trailer with a "blue outbuilding on it." Deputy Davis noted that the shed was "very oversized for the vehicle." When Deputy Davis stopped the truck and questioned the defendant, the defendant told him that "he had bought [the shed] from a lady back down the road." Deputy Davis testified that he did not check to see if the defendant had a driver's license. He recalled, however, that the defendant asked him if his female passenger could drive the truck. Deputy Davis observed the truck travel "to another residence and turn[] right down the driveway." Deputy Davis stated that he "assumed that that's where they might live" and that he "continued on" without any further investigation.

Ms. McDonald testified that in September 2004 she was friends with the defendant, whom she had known for approximately one year, and Carol Walker, whom she had known for approximately 20 years, and that she arranged to buy a shed from the defendant. Ms. McDonald explained that she needed an outbuilding for a yard sale that she was planning, and the defendant "told [her] that he had one for sale and that he would let [her] have it." The two "made arrangements" for her to purchase the shed from the defendant.

Ms. McDonald testified that the defendant offered to sell her an outbuilding for $1,500. She stated that she paid the defendant $300 cash and made a check out to a car dealership for $250 at the request of the defendant. However, when the defendant told her he could not deliver

the shed, she cancelled the check. Ms. McDonald then made arrangements to buy a shed from Sears. When the defendant informed her that he had another shed to offer her, however, she cancelled her order at Sears. She explained that, at the defendant's request, she made a check for $300 out to Carol Walker as partial payment for the shed.

Ms. McDonald testified that in early September the defendant and Ms. Walker brought a shed to her residence on a trailer affixed to "that little four-wheel drive truck." She identified both the shed and the pickup truck as depicted in the photographs in evidence. She said that the shed was "full of personal belongings." She stated, "There were pictures and there was craft stuff and there was a vanity sink and a desk." A blueprint and "some books" were also in the shed. Ms. McDonald testified that the defendant and Ms. Walker loaded all the personal belongings "on the back of [Ms. McDonald's] little Ford Ranger." Ms. McDonald testified that she later sold her Ford Ranger along with the items in it.

Ms. McDonald said that the "deal" fell apart on September 18, 2004. She testified that she suspected that the shed was stolen and when she asked "to meet the man that [the defendant] bought the building off of," the defendant responded, "You don't meet that man. . . . You deal through me." Ms. McDonald told the defendant that she would not pay him the remainder of money owed for the shed until she "[met] the man." Ms. McDonald testified that this angered the defendant, and she contacted law enforcement personnel about the shed.

On cross-examination, Ms. McDonald testified that Ms. Walker was always present when she and the defendant discussed the purchase of a shed; however, Ms. McDonald maintained that she only "dealt" with the defendant, not Ms. Walker.

Deborah Gray testified that in 2002, she left her residence at 1581 Ozone Road in Rockwood, Tennessee, and moved to Utah. Before leaving the property; however, she arranged for friends in Rockwood to "watch over the place." She testified that she left her "whole life" including her "pictures of her life" on the property. She testified that she did not give anyone authority to sell or take anything from her property. Ms. Gray did not know the defendant, and she did not give him permission to use her property or exercise any type of control over her property.

Ms. Gray identified the shed in the State's photograph as one of two storage sheds that belonged to her and her husband and that had been located on her Ozone Road property. She testified that, when she last saw the shed, it was "jam packed full" of things, including a water bed, oil paintings, food, clothing, and a tool used for lifting cars. She testified that she and her husband bought the shed in approximately 1997 and that they had paid $6,000 for it.

The defendant chose not to testify and presented no proof. Based on the evidence as summarized above, the jury convicted the defendant of theft of property valued at $1,000 or more and imposed a $1,000 fine. During the sentencing hearing, the trial court waived the $1,000 fine but ordered $700 in restitution payments to Ms. Gray and her husband and $300 in restitution payments to Ms. McDonald.

I. Sufficiency of the Evidence

The defendant challenges the sufficiency of the convicting evidence on appeal, arguing that "[b]ecause the evidence against [the defendant] (particularly Ms. McDonald's testimony) is suspect, no rational trier of fact could convict [the defendant]." The State, obviously, disagrees.

A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-14-103 states that "[a] person commits theft of property if, with intent to deprive the owner of the property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103 (2003). The theft of property with a value of "one thousand dollars ($1,000) or more but less than ten thousand dollars ($10,000)" is a Class D felony. *Id.* § 39-14-105(3).

The evidence adduced at trial, viewed in a light most favorable to the State, supports the jury's verdict. The owner of the shed, Ms. Gray, positively identified the shed depicted in the photograph and located at Ms. McDonald's residence as hers, and she testified that she did not give the defendant permission to exercise control over the shed. Ms. Gray stated that she paid $6,000 for the shed. Deputy Aytes recognized the shed located on Ms. McDonald's property as the one he had seen on the Ozone Road property. After viewing the shed, he then drove to Ms. Gray's property and observed that the shed was missing. Deputy Davis positively identified the defendant as driving a truck pulling the same shed on a trailer. Ms. McDonald testified that the defendant delivered the shed to her and that, when she insisted on finding out where the defendant obtained the shed, he refused to tell her.

Although the defendant characterizes the testimony as "suspect," it is well settled that determinations of the credibility of witnesses rest soundly within the discretion of the jury. *See Bland*, 958 S.W.2d at 659. Thus, any issues regarding credibility were resolved by the jury's verdict, and we will not disturb their decision.

II. Restitution

Although neither of the parties has challenged the trial court's award of restitution to Ms. McDonald, we are compelled to review the order under our authority to address plain error. "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). The ordering of restitution to be paid to Ms. McDonald is an error affecting the substantial rights of the defendant.

"As a general rule, courts exercising criminal jurisdiction are without inherent power or authority to order payment of restitution except as is derived from legislative enactment." *State v. Alford*, 970 S.W.2d 944, 945 (Tenn. 1998). Code section 40-35-304 states that "[a] sentencing court may direct a defendant to make restitution to the *victim* of the offense as a condition of probation." T.C.A. § 40-35-304(a) (2003) (emphasis added). Our supreme court has recognized that "it is apparent that the word 'victim' refers to the individual or individuals against whom the offense was actually committed. Nothing in the statute supports a broader application." *Alford*, 970 S.W.2d at 946.

In *Alford*, our supreme court ruled that the trial court's award of restitution to an insurance carrier that had paid the assault victim's medical expenses was unauthorized by statute because the insurance carrier was not a "victim" as that term is used in Code section 40-35-304. *Id.* at 945. In *State v. Cross*, 93 S.W.3d 891 (Tenn. Crim. App. 2002), this court examined the holding in *Alford* and concluded that the trial court's award of restitution to an insurance carrier that was defrauded as a direct "result of the fraudulent claim made directly against it by the defendant" was appropriate because the insurance carrier, under those circumstances, was a "victim" of the conviction offense. *Id.* at 895.

Similarly, in *State v. Christopher Shane Poole*, ___ S.W.3d ___, No. M2007-01041-CCA-R3-CD (Tenn. Crim. App., Nashville, May 29, 2008), this court upheld the payment of restitution to a bank from which the defendant made a fraudulent withdrawal of funds. *See id.*, slip op. at 1. Noting that "[t]he bank was not an insurer in the present case; it did not insure the account against the risk of the [d]efendant's crime, receive compensation for doing so, or contract to assume economic liability for the [d]efendant's crime," this court concluded that the bank was a "direct" victim of the defendant's crime and, thus, entitled to restitution under the statute. *Id.*, slip op. at 6. We emphasized,

> The [d]efendant committed these offenses by entering the bank premises and deceiving bank employees. The bank was specifically referenced in the indictment. The object of the Defendant's crime

> was to enter the bank and make fraudulent withdrawals from funds managed by the bank. The bank did not accept this risk of fraud.

Id. (citations omitted).

In this case, the trial court ordered the payment of $300 "restitution" to Ms. McDonald. The record establishes, however, that Ms. McDonald was not a victim as defined by Code section 40-35-304. The May 10, 2005 indictment alleged that the defendant "unlawfully and knowingly exercised control over property, *to-wit: a storage building . . . belonging to David and Debra Gray*." (Emphasis added.) The proof adduced at trial established that the charged offense was complete when the defendant exercised control over the shed and that it occurred wholly before he took funds from Ms. McDonald. Ms. McDonald was not a direct victim of the defendant's theft of the shed. Although Ms. McDonald suffered a pecuniary loss at the hands of the defendant, her loss was not the direct result of his theft of the shed from the named victims. In consequence, Ms. McDonald was not a "victim" as defined by Code section 40-35-304, and, as such, the trial court was without authority to grant the payment of restitution to her.

III. Conclusion

We affirm the defendant's conviction; however, in light of the plain error regarding the defendant's sentence, the judgment must be modified to reflect the deletion of any restitution payment to Ms. McDonald.

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JAMES CURWOOD WITT, JR., JUDGE